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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

TERRANCE S. HAYNIE,)
)
Plaintiff,) No. 3:15-cv-00467-VC
)

v.)
)

UNITED AIR LINES, INC.;)
CONTINENTAL AIRLINES, INC.;)
and DOES 1 - 10, et al.,)
)

Defendants.)
)

ELDRIDGE JOHNSON, an)
individual,) No. 3:12-cv-02370-VC
)

Plaintiff,)
)

v.)
)

UNITED AIR LINES, INC.;)
CONTINENTAL AIRLINES, INC.;)
and DOES 1 - 10,)
)

Defendants.)
)

AND RELATED CASES

San Francisco, California
Thursday, April 9, 2015

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
RECORDING - FTR 10:03 - 10:56

APPEARANCES:

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(Except Haynie)

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(APPEARANCES CONTINUED ON FOLLOWING PAGE:)

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Transcribed by:

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Contract Reporter/Transcriber

Thursday, April 9, 2015

10:03 A.M.

P R O C E E D I N G S

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THE CLERK: Please be seated.

Calling case numbers 15-cv-00467, Haynie versus United Airlines, Inc., and case No. 12-cv-2730, Johnson, et al., versus United Continental Holdings Inc., et al.

The other related cases have previously been called into the record before counsel came into court.

Please state your appearances for the record.

MS. SIMS: Good afternoon -- good morning, Your Honor, Lanesha Sims, pro hac, for Plaintiff Haynie.

THE COURT: Good morning.

MR. SMITH: Good morning, Your Honor, Spencer Smith on the remaining plaintiffs.

THE COURT: Good morning.

MR. PATTEN: Good morning, Your Honor, Dow Patten for the remaining plaintiffs as well.

THE COURT: Good morning.

MS. MELBY: Good morning, Your Honor, Donna Melby, Paul, Hastings, on behalf of all of the defendants.

Jennifer Baldocchi of Paul, Hastings is also present this morning.

THE COURT: Good morning.

Okay. So Ms. Sims, you represent Mr. Haynie?

1 **MS. SIMS:** That's correct, Your Honor.

2 **THE COURT:** Okay. Your case management statement was a
3 little bit confusing, but it seems as if you made a passing
4 reference in there to a stipulation to transfer venue.

5 **MS. SIMS:** That is --

6 **THE COURT:** Are you agreeing that venue should be
7 transferred?

8 **MS. SIMS:** We are in agreement to transferring to the
9 plaintiff's domicile, which was DCA.

10 **THE COURT:** Okay. So in that case, I don't think it
11 would be appropriate for me to set a further -- I appreciate
12 you proposing a further schedule, but I think the most
13 appropriate thing would be to let the unfortunate district
14 judge who receives this in Virginia to deal with all that
15 stuff.

16 **MS. SIMS:** And that was going to be what plaintiff would
17 propose, Your Honor, that the Court -- that the transferee
18 court does set the scheduling. And if Your Honor is in
19 agreement with that, we'd certainly agree.

20 **THE COURT:** Yes. So why don't you submit a stipulation
21 to transfer the case.

22 I may write and explain it -- given the unusual nature of
23 this case and these cases, I may actually write a little
24 something of my own, explaining what's happened and why -- why
25 they're being transferred at this late hour. Something about

1 which, frankly, I'm a little bit embarrassed for our court.

2 But, in any event, submit a stipulation and then I'll add
3 to it or write something myself, or something like that.

4 MS. SIMS: Absolutely, Your Honor.

5 THE COURT: And then you're done. Free to go, if you'd
6 like.

7 MS. SIMS: That works.

8 THE COURT: Great.

9 MS. SIMS: All right. Thank you.

10 THE COURT: All right. Now, so we have 22 cases left.
11 All right?

12 You know, I'm glad we put this over for a couple of weeks
13 so that I could ponder it a little more and read the complaints
14 more carefully.

15 Because I've done that now, and I think the biggest
16 problem is that the complaints still do not state a claim for
17 race discrimination.

18 It may be that the few plaintiffs who applied for posted
19 positions, they may state a claim for race discrimination with
20 respect to their efforts to obtain posted positions.

21 It may be that they state a claim for race discrimination
22 because the complaints effectively allege, although could do
23 so a little more -- the complaints could do so a little more
24 clearly, but the complaints effectively allege that the
25 plaintiffs applied for these posted positions and were denied

1 them because of their race.

2 But none of the -- but there are a number of plaintiffs
3 who didn't apply for posted positions, and they do not state a
4 claim for race discrimination as to the unposted positions.
5 Whether you're talking about the unposted managerial positions
6 or the special assignment positions, which you allege are also
7 managerial positions.

8 What the complaints allege is that the plaintiff was
9 denied the opportunity to participate in the filling of vacant
10 positions. I may not have the language exactly right, but it's
11 something almost exact -- almost exactly like that. Denied the
12 opportunity to participate in the filling of vacant positions.

13 And then there's a laundry list of vacant positions, and
14 it's basically, as far as I can tell, pretty much the same
15 laundry list of vacant positions for each plaintiff.

16 I don't think -- I mean, unless you are alleging that the
17 decision by United not to post the positions was, in itself,
18 motivated by a desire to prevent African Americans from
19 applying to those positions -- and my sense is that you're not
20 alleging that, both from reading the complaints and from our
21 discussion last time, my sense is that's not what you're
22 alleging --

23 I mean, I suppose if you did allege that, then that might
24 state a claim for race discrimination.

25 But my sense, from our discussion a couple of weeks ago,

1 is that your claims, as to each of these plaintiffs, is that
2 even though these positions were unposted, they made it known
3 to the decision-makers that they wanted to be -- they wanted to
4 apply for those positions, and the decision-makers either
5 refused to consider them because they were African American, or
6 that they considered them but didn't give them the job because
7 they were African American.

8 That would state a claim for race discrimination, but
9 it's not in the complaints.

10 **MR. SMITH:** Your Honor, I want to address each of the
11 points you've made so far, just so we can --

12 **THE COURT:** Before we got lost.

13 **MR. SMITH:** Yeah. I want to stay on the same page with
14 you.

15 Number one, the law of the case, Judge Chesney has
16 already said we've stated plausible claims.

17 **THE COURT:** If, to the extent that she said that, I think
18 she's wrong. I don't think -- and, by the way, Judge Chesney
19 never reviewed the individual complaints after she severed the
20 23 cases. She never reviewed the individual 23 complaints that
21 you filed to determine whether you stated a claim in those
22 complaints.

23 I have reviewed those, and my -- I mean, I would give you
24 a chance to brief it, if we decide to go that route, but I
25 don't see how they state a claim for race discrimination,

1 subject to the exception that I --

2 MR. SMITH: And that's what I want to do. I want Your
3 Honor to be informed about what our position is if we take this
4 route.

5 The concern that I have is, number one, we've spent three
6 years dealing with the very issues that are causing the Court
7 concern now.

8 THE COURT: That's because you cobbled these 23
9 plaintiffs together in a case where they should never have been
10 joined in the same case.

11 MR. SMITH: And if they shouldn't have been joined in the
12 same case, we cannot discuss them as if they're still one.

13 And what's happening now, Your Honor, is we have the
14 defendant asking the Court to go outside of the four corners of
15 the pleadings.

16 And, Your Honor, let me give you --

17 THE COURT: Wait. What?

18 MR. SMITH: You're saying the evidence of the cut and
19 paste is that I'm looking at 22 other complaints and they're
20 all the same positions. And that doesn't make it plausible.
21 So --

22 THE COURT: I'm not -- that's not what I'm talking about.

23 MR. SMITH: Okay.

24 THE COURT: I looked at each complaint -- I'm not talking
25 about the defendant's arguments; I'm talking about my

1 independent review --

2 MR. SMITH: Okay.

3 THE COURT: -- of the complaints that you filed on behalf
4 of these 22 individuals, which are largely identical.

5 And, in each of them, with the exception of the
6 applications for the posted positions, they don't state a
7 claim.

8 Let's look at an example.

9 MR. SMITH: Well, Your Honor, just before -- before we go
10 onto an example, --

11 THE COURT: Okay.

12 MR. SMITH: -- the complaint is drafted with the
13 direction of Judge Chesney limiting us with what we can do.

14 For example, you said --

15 THE COURT: Show me the language in Judge Chesney's
16 orders which --

17 MR. SMITH: I can give you an example.

18 THE COURT: Okay.

19 MR. SMITH: One example, Your Honor, would be -- you said
20 if there was a policy not to post the positions because United
21 did not want to consider African Americans for the positions,
22 that would state a plausible claim for race discrimination.

23 THE COURT: Well, I mean, I want to make sure we're using
24 very precise language here.

25 What I said is that if the decision to not post the

1 positions was motivated by a desire to prevent African
2 Americans from getting promotions -- which, by the way, you
3 know, that seems extremely farfetched, but I think it
4 probably -- if you alleged that, it would probably state a
5 claim.

6 MR. SMITH: We alleged that in one of our complaints, and
7 Judge Chesney said that does not state a policy.

8 THE COURT: Oh, I thought -- I thought that you -- I
9 thought that what you alleged previously was a disparate impact
10 claim based on that.

11 MR. SMITH: Correct.

12 THE COURT: I'm talking about disparate treatment. The
13 decision -- Judge Chesney ruled that you couldn't state a
14 disparate impact claim; right?

15 MR. SMITH: And she said --

16 THE COURT: I was not totally clear, from reading those
17 rulings, exactly what your disparate impact claims were, and I
18 haven't gone back and read every iteration of your complaints
19 to try to figure -- or the briefs in the prior rounds of
20 motions to dismiss to try to figure out what your disparate
21 impact claims were.

22 MR. SMITH: Okay.

23 THE COURT: Because those -- everybody's sort of agreed
24 that those were gone; right? And then all we had left was an
25 intentional discrimination claim, a disparate treatment claim.

1 And the idea that United Airlines decided not to post
2 particular managerial positions to prevent -- intentionally, to
3 prevent African Americans from attaining them, it seems
4 farfetched to me.

5 **MR. SMITH:** That's not -- it may seem farfetched to you,
6 but that's not for the bench to do; that's for a jury to
7 decide.

8 **THE COURT:** Exactly. And that's why I said at the
9 out- --

10 It may or may not be for a jury to do. It may be for the
11 bench to do at summary judgment, but it's --

12 **MR. SMITH:** And -- correct --

13 **THE COURT:** But -- but, as I said at the outset, I didn't
14 think you were alleging -- I mean, if you had gone that route
15 and said, United -- and put aside your dis- -- the disparate
16 impact theory -- because we're not talking about disparate
17 impact now, we're talking about intentional discrimination --
18 if -- what I said at the outset was, if these complaints
19 alleged that United had a plan to not post these positions for
20 the purpose of preventing African Americans from attaining
21 them, that probably would state a claim. But that's not what
22 these complaints allege.

23 If you included allegations in the complaints along the
24 lines of what you pitched to me when we were here two weeks
25 ago, which is that these positions were unposted but the

1 plaintiff attempted to attain this position, applied for this
2 position, put his hat in the ring for the position, whatever,
3 and was denied the position because he was African American,
4 that would state a claim.

5 So one of those two things -- I think either of those two
6 things would probably state a claim at the 12(b)(6) stage, but
7 you didn't include either of those in the actual complaints.

8 **MR. SMITH:** And, again, I think we have to -- my concern
9 here is following the Federal Rules of Civil Procedure and the
10 12(b) standard and not converting this to a summary judgment
11 standard.

12 **THE COURT:** It's not converted to a summary judgment
13 standard.

14 **MR. SMITH:** Okay.

15 **THE COURT:** Because you -- neither of those theories is
16 embedded in any of the complaints you filed on behalf of your
17 clients.

18 **MR. SMITH:** But the theory that -- the facts is -- we
19 don't plead theories, we plead facts. And the facts that are
20 in the complaint, Judge Chesney took three years and ruled that
21 they were sufficient to state disparate treatment claims.

22 **THE COURT:** I do not believe that these complaints --
23 now, I'm not going to decide the issue now; right? I'm not
24 going to decide the issue now. But I do not -- I would be very
25 surprised if, at the end of the day, I concluded that these

1 complaints, with the exception with the applications for the
2 posted positions, stated a claim for racial discrimination.

3 And so what my inclination is, is to perhaps issue an
4 order to show cause why the complaints should not be dismissed
5 for failure to state a claim, at which point you can -- you
6 have a choice. You can brief it and we can have a hearing on
7 it and if I ruled that the complaints failed to state a claim
8 for race discrimination, I'll give you another -- I'll give you
9 a chance to amend.

10 Or, you could -- I could issue an order to show cause and
11 you could analyze my order to show cause and you could decide
12 on your own to amend the complaints.

13 Either way you will have one more chance to amend your
14 complaints to state a claim for race discrimination.

15 If you don't, in your amended complaints, state a claim
16 for race discrimination, the complaints are going to be
17 dismissed with prejudice.

18 **MR. SMITH:** Your Honor, the Ninth Circuit precedent on
19 revisiting district court orders is very clear and there's a
20 standard that has to be met and that's manifest error. New
21 law --

22 **THE COURT:** How did -- show me -- let's look at the
23 Robinson complaint. Show me how it states a claim.

24 **MR. SMITH:** Let's look at the Robinson complaint.

25 **THE COURT:** Let's look at the language.

1 **MR. SMITH:** Your Honor, the concern that we're having for
2 three years is that how can African Americans challenge
3 unposted positions and how to plead it. Because if we're going
4 to create a new standard of specificity for pleading when it
5 comes to unposted positions, which is you have to say "I'm
6 looking for indicia of the plaintiff coming in," and saying,
7 "Give me the fact that you put your name in the hat, tell me
8 how the discrimination occurred, you have to meet some level of
9 specificity," it's not required under law. We have no notice
10 pleading standards.

11 **THE COURT:** But you don't even allege that these people
12 put their names in the hat. You don't even allege --

13 **MR. SMITH:** We don't have to.

14 **THE COURT:** Again, let's -- let's -- all you allege is
15 that these positions were not posted and therefore I was denied
16 the opportunity to participate in the filling of the vacancies.

17 And then you list 40 examples of positions that other
18 people got.

19 But there's no allegation -- just to use Mr. Robinson as
20 an example -- but all the complaints are the same, they're all
21 identical, they're worded in exactly the same way.

22 But to use Mr. Robinson as an example, he never alleges
23 that he put his hat in the ring for any of these positions, and
24 he never alleges that he was denied participation in those
25 positions because of his race.

1 And we sat here two weeks ago and you were looking at
2 me -- looking me in the eye and you said that that was your
3 theory of the case.

4 **MR. SMITH:** And my theory doesn't have to be in the
5 complaint.

6 **THE COURT:** Yes, it does.

7 **MR. SMITH:** No, it does not.

8 **THE COURT:** Because the allegations in the complaint do
9 not state a claim for race discrimination.

10 **MR. SMITH:** Judge Chesney already agreed --

11 **THE COURT:** They do not allege.

12 **MR. SMITH:** Judge Ches- -- what I'm confused about is
13 what did Judge Chesney get wrong? After three years of being
14 very familiar with our facts and instructing us how to amend.

15 **THE COURT:** To the extent --

16 **MR. SMITH:** We --

17 **THE COURT:** To the extent that she believed -- first of
18 all, I will repeat, once again, that she never had an
19 opportunity to review the 22 individual complaints that you
20 filed on behalf of your clients. She reviewed a prior version
21 of the complaint where allegations -- was one complaint where
22 allegations were made on behalf of 22 clients.

23 You filed Amended --

24 **MR. SMITH:** Your Honor, there's no difference -- there's
25 no difference in these complaints.

1 **THE COURT:** Okay.

2 **MR. SMITH:** Your Honor --

3 **THE COURT:** To the extent that her prior rulings stand
4 for the proposition that these complaints state a claim for
5 intentional race discrimination, I believe she was wrong.

6 **MR. SMITH:** And I believe you don't have the authority --

7 **THE COURT:** To the extent --

8 **MR. SMITH:** -- to revisit that issue, unless certain
9 enumerated factors are here, which are not present in this
10 case.

11 **THE COURT:** Okay. Well, it sounds like what you would
12 like to do is, is brief that issue and argue that issue.

13 **MR. SMITH:** I think we're going to have to.

14 **THE COURT:** And that would be fine.

15 **MR. SMITH:** I will. I will. I'll be comfortable with
16 that.

17 **THE COURT:** That will be fine.

18 So the only other question I have is -- the only other
19 question I have is about transfer.

20 **MR. SMITH:** Yes.

21 **THE COURT:** Right? And I thought your chart was fairly
22 helpful in getting me to understand the transfer issues. So
23 let me --

24 **MR. SMITH:** And, Your Honor, I just want to be very
25 careful. I'm very concerned about the 12(b) procedure being

1 converted to a motion for summary judgment. And that's because
2 at the venue stage, Your Honor --

3 **THE COURT:** I haven't looked at any evidence.

4 **MR. SMITH:** Okay.

5 **THE COURT:** All I've done is read the complaints. And
6 I'm telling you that I don't think they state a claim for race
7 discrimination.

8 What is this business about summary judgment?

9 **MR. SMITH:** Here's my concern --

10 **THE COURT:** You have to include factual allegations in
11 the complaint that, if proven true, would state a claim for
12 race discrimination.

13 I don't believe you've done in that any of these 22
14 complaints, which you've cut and pasted from your prior
15 complaint and you filed identical complaints on behalf of 22
16 plaintiffs.

17 And, frankly, I mean, I -- I think it's borderline
18 malpractice, what you've done. Because you're not serving the
19 interest of your clients by including individualized --
20 individualized allegations based on their own situations.
21 You've cut and paste -- you've done a cut and paste job which
22 pays no mind --

23 **MR. SMITH:** At the direction of the Court.

24 **THE COURT:** -- to their --

25 **MR. SMITH:** At the direction -- Your Honor, we had very

1 specific instructions from Judge Chesney. And we were not
2 allowed to add things in. We got instructions from Judge
3 Chesney to list out the positions. We have faced several
4 motions to strike for adding things in, adding further
5 explanation or background evidence.

6 **THE COURT:** Okay.

7 **MR. SMITH:** We have been very limited.

8 **THE COURT:** Okay.

9 **MR. SMITH:** This is not malpractice. I have to follow
10 the instructions of the Court for the past three years. And
11 the Court has been instructive on how we were to plead this
12 particular case.

13 I did not have the wiggle room to --

14 **THE COURT:** I didn't see anything in Judge Chesney's
15 orders which prevented you, after the cases got severed, from
16 filing complaints on behalf of your clients that spoke to their
17 particular circumstances.

18 That's the whole point of severing the cases. Is that
19 each -- each of your clients has an individual case, and it's
20 not the same as the other plaintiffs.

21 And so --

22 **MR. SMITH:** But Your Honor.

23 **THE COURT:** -- to then just cut and paste the exact same
24 boilerplate generic allegations as to each of your clients, I
25 don't understand how you think it's okay to do that.

1 **MR. SMITH:** Your Honor, if we're at the 12(b) stage, and
2 you say one of the things that you're concerned about is that
3 we have duplicative language with other --

4 **THE COURT:** I'm concerned about the fact that each and
5 every one of these complaints, with the exception that I gave
6 about the posted positions, does not state a claim for --
7 individually state a claim for race discrimination.

8 Even if there were the other 21 --

9 **MR. SMITH:** We're not there.

10 **THE COURT:** -- complaints, --

11 **MR. SMITH:** We're not there.

12 **THE COURT:** -- we're not here.

13 **MR. SMITH:** Okay.

14 **THE COURT:** Even if Robinson's --

15 **MR. SMITH:** By himself.

16 **THE COURT:** -- was the only complaint here, I would be
17 telling you exactly the same thing.

18 **MR. SMITH:** Okay. Because --

19 **THE COURT:** Which is, it does not state a claim for race
20 discrimination because it doesn't identify which positions --
21 it doesn't -- it doesn't articulate facts that would support
22 either of the two theories we discussed.

23 Either United Airlines somehow intentionally decided not
24 to post positions in order to prevent African Americans from
25 obtaining them, or he put his hat in the ring for this position

1 that happened to be unposted and --

2 **MR. SMITH:** So --

3 **THE COURT:** -- which, by the way, is neither here nor
4 there, and he was denied the position because he was African
5 American.

6 The factual allegations --

7 **MR. SMITH:** You're asking me to plead --

8 **THE COURT:** Don't interrupt me.

9 **MR. SMITH:** I'm sorry.

10 **THE COURT:** The factual allegations in Mr. Robinson's
11 complaint -- and, in everybody's else's, but pretend I only
12 have Mr. Robinson -- the factual allegations in Mr. Robinson's
13 complaint do not support either theory.

14 **MR. SMITH:** Your Honor, both of your theories will
15 require the plaintiff to plead direct evidence. Your first
16 theory is, "I know why United did this." How would you know
17 United -- United didn't post these positions because they
18 didn't want African Americans to get the position.

19 **THE COURT:** Okay.

20 **MR. SMITH:** That would require --

21 **THE COURT:** You're going to have an opportunity to argue
22 this; okay?

23 **MR. SMITH:** Okay.

24 **THE COURT:** I'm going to issue an order to show cause and
25 you're going to have an opportunity to argue this.

1 I'm going to tell you right now, and I'm going to ask you
2 to think carefully about it; okay? You are going to have --
3 either I'm going to issue the order to show cause and we're
4 going to have a hearing and I'm going to decide on the order to
5 show cause --

6 MR. SMITH: Yes; mm-hm.

7 THE COURT: -- and I'm going to decide whether the
8 complaints should be dismissed for failure to state a claim --

9 MR. SMITH: Yes; yes.

10 THE COURT: -- or I'm going to issue the order to show
11 cause and you're going to decide voluntarily that you want to
12 amend the complaints to try to state individual claims for race
13 discrimination on behalf of the plaintiffs.

14 Either way -- I just want to be very clear. Either way,
15 you are going to have one more chance to amend your complaints.

16 MR. SMITH: Okay.

17 THE COURT: Okay?

18 MR. SMITH: Okay.

19 THE COURT: This is going to be your last chance. And if
20 you don't state a claim for race discrimination on behalf of
21 these clients you're supposed to be representing, I'm going to
22 dismiss them with prejudice. Okay?

23 You'll have plenty of time to argue with me about it
24 later, but that's what's going to happen.

25 MR. SMITH: Your Honor, what's the dearth of

1 jurisprudence on the issue of unposted positions and how
2 they're to be pled? You're going to ask -- you're --

3 **THE COURT:** I will tell you this; okay? There is nothing
4 inherently illegal with not posting positions. There is
5 nothing inherently legal -- illegal about not posting
6 positions.

7 **MR. SMITH:** Correct.

8 **THE COURT:** Which is if you have to include -- I've
9 repeated myself over and over again. It sounds like maybe
10 you're not listening to me. But you will have an opportunity
11 to argue with me on this.

12 **MR. SMITH:** Okay.

13 **THE COURT:** Okay? No more now.

14 **MR. SMITH:** Okay.

15 The other issue, Your Honor, before we go onto the venue
16 question.

17 **THE COURT:** Yes.

18 **MR. SMITH:** This is my concern: So the venue motion
19 allows you to go outside of the pleadings and consider
20 evidence. We can marshal evidence and say, "Hey, let's --
21 we've already started this process with the discovery
22 limited --

23 **THE COURT:** About Taleo.

24 **MR. SMITH:** About Taleo.

25 **THE COURT:** Only about Taleo.

1 **MR. SMITH:** I think we need to handle the venue issue
2 first. Because if -- we're going to have a lot of information.

3 **THE COURT:** Here's the problem with that.

4 **MR. SMITH:** Okay.

5 **THE COURT:** Okay? I mean, I'm willing to hear a proposal
6 about that, but let me tell you what I was planning to do about
7 venue and then we can -- we can discuss that.

8 As I was saying, your chart, I found, to be quite
9 helpful. Let me just quickly pull it up here.

10 And so it seems like you have five people -- according to
11 your chart, the last five people on your chart; right?

12 **MR. SMITH:** Correct.

13 **THE COURT:** Montgomery, Gadson, Noble, Roane, and Tom?

14 It sounds like those five people are not
15 California-based, did not apply for a posted position in
16 California, and were not, according to you, passed over for
17 temporary positions in California.

18 **MR. SMITH:** They were not recognized by Judge Chesney to
19 have been passed over for California positions. They're still
20 challenging the 21 positions. Judge Chesney did not recognize
21 the claim under FEHA for that.

22 **THE COURT:** Okay.

23 **MR. SMITH:** So we were just trying to give -- Your Honor,
24 we anticipated where this was going, and we wanted -- and our
25 theory and our argument is coming out this morning. And I do

1 apologize, Your Honor, for going very in-depth into that
2 argument.

3 **THE COURT:** No, no, that's okay.

4 **MR. SMITH:** So what our chart wanted to do was summarize
5 her order so that we can inform Your Honor what we believe to
6 be the limitations of review.

7 So for the venue question --

8 **THE COURT:** So what -- so for Montgomery, Gadson, Noble,
9 Roane and Tom, the venue hook is Taleo? Is that right?

10 **MR. SMITH:** No. So for Montgomery and Gadson, they're
11 the only two that are only going to be -- they're using Taleo
12 only.

13 **THE COURT:** What about Noble --

14 **MR. SMITH:** Noble, Roane, and Tom still have the special
15 assignments, unposted positions that you're concerned about.

16 Judge Chesney just didn't rule that they stated a claim
17 under California law.

18 That was the point we wanted to make with this particular
19 column.

20 **THE COURT:** Okay.

21 **MR. SMITH:** We still, Your Honor -- you and I are going
22 to have a disagreement. We want to use Judge Chesney's ruling
23 as a basis going forward, and I don't think that's going to
24 happen. And that's what our chart is trying to summarize here,
25 is that Judge Chesney, for some of the -- some of the

1 plaintiffs, she said, "You stated for the unposted positions.
2 I'm going to recognize these as California-based positions
3 under California's Fair Employment and Housing Act," and for
4 others, because either they didn't exhaust properly, she did
5 not recognize a stated cause of action for those claims.

6 **THE COURT:** So here's the problem I have with deciding
7 venue before the complaints are amended. I mean, what I was
8 assuming from your chart is that -- and it seems like maybe
9 this was an incorrect assumption, now. But what I was assuming
10 from your chart is that the final five people on the chart,
11 Montgomery, Gadson, Noble, Roane and Tom, their only venue hook
12 was Taleo.

13 **MR. SMITH:** No, that's just for Montgomery and Gadson.

14 **THE COURT:** Just Montgomery and Gadson --

15 **MR. SMITH:** Yes, Your Honor.

16 **THE COURT:** -- the only venue hook is Taleo.

17 **MR. SMITH:** Yes.

18 **THE COURT:** Okay.

19 **MR. SMITH:** Now --

20 **THE COURT:** And what I was thinking of doing is for
21 the -- what I was thinking of doing for the people whose only
22 venue hook was Taleo --

23 **MR. SMITH:** Yes.

24 **THE COURT:** -- was to certainly tee those up for transfer
25 motions right away, without you having to amend the complaint,

1 if you don't want to.

2 MR. SMITH: Yes.

3 THE COURT: Because that -- if everybody agrees that the
4 only venue hook is Taleo, then we can decide the Taleo issue.
5 And if the cases get transferred, they get transferred, and
6 then the poor judge who receives them has to -- has to deal
7 with figuring out whether they state a claim at all and how
8 to -- how to proceed with discovery and whatnot.

9 So what I don't want to do -- you know, my concern is --
10 you know, I think one of the problems with this case is that
11 before deciding where the cases should be, and before deciding
12 whether they should be separate cases or, you know, one
13 case -- you know, there was all this time spent on the
14 pleadings, and it seems like the decision about where they
15 should be and whether they should be joined or separate, you
16 know, it would have been better, maybe, if those decisions
17 would have come first.

18 But -- so -- so I'm tempted to let them file a venue
19 motion on all the cases before the pleadings are amended.

20 But here's the problem with that:

21 MR. SMITH: Okay.

22 THE COURT: Okay? The allegations -- because the venue
23 would be based on whether any of the wrongdoing had a
24 connection to California, and because they don't state a
25 claim -- you know, they just throw in these 40 special

1 assignment positions, but they don't -- the complaint throws in
2 40 special assignment positions but doesn't indicate which ones
3 the individual plaintiff was actually denied because of race,
4 there is no way to tell whether there's a California connection
5 in any particular case.

6 MR. SMITH: Okay. So, for example, Your Honor, we have a
7 position in the long list of positions, the 43 positions, and
8 21 of them are California-based positions.

9 THE COURT: Mm-hm.

10 MR. SMITH: 21 of the 43.

11 THE COURT: Yeah.

12 MR. SMITH: Okay? So let's first start with the first
13 21.

14 For the venue question, there's going to be three bases;
15 right? Either you would have worked in California; a decision
16 was made in California; or the records are in California.

17 THE COURT: Right.

18 MR. SMITH: For those 21 positions, it's not going to be
19 an -- the venue issue --

20 THE COURT: Except for the complaint doesn't state a
21 claim that the plaintiff was denied any one of those 21
22 California positions because of his race, and so how can I
23 decide the venue question when I don't know what is the basis
24 for the claim?

25 I mean, the venue question -- the venue question is based

1 on what is the basis for the claim, and I read the complaint
2 and I have no idea what is the basis for the claim.

3 **MR. SMITH:** Your Honor, the issue of notice, you know, it
4 (indiscernible) standard. We've litigated it for three years
5 and I hate to keep going back to that point.

6 If there was an issue regarding notice, those arguments
7 have been waived by the defendant.

8 But even if we get back to this point on the 21
9 positions, plausibility is not an issue at venue. Venue is
10 decided early on in cases. You don't -- you don't --

11 **THE COURT:** Yeah, but how can I decide venue if I don't
12 know what the lawsuit is actually based on?

13 **MR. SMITH:** There's 21 California positions that they
14 allege they were passed over for.

15 **THE COURT:** They don't -- it doesn't allege that. It
16 does not allege that they were passed over. The complaints do
17 not allege that. What the complaints allege is that they were
18 denied the opportunity to participate in the filling of
19 vacancies of 45 positions. It never --

20 **MR. SMITH:** This was --

21 **THE COURT:** We don't know what that allegation means.
22 That's a very wishy-washy allegation. Does that mean they
23 never knew about it, or does that mean they knew about it and
24 they put their hat in the ring but they were rejected by the
25 decision-maker because they were African American? We have no

1 idea what that allegation means.

2 MR. SMITH: Your Honor, you have to appreciate my dismay
3 with the process, in that we worked with the District Court
4 here in the Northern District of California --

5 THE COURT: Stop complaining about that. Let's move
6 forward. Okay?

7 MR. SMITH: Your Honor, so --

8 THE COURT: What -- we have no idea --

9 MR. SMITH: Cases, cases are -- especially discrimination
10 cases, they're based on proof, not pleadings. We've wasted
11 three years now --

12 THE COURT: But you have to plead --

13 MR. SMITH: We've wasted three years --

14 THE COURT: You wasted three years by filing the case
15 this way. But we have to -- cases -- I don't want to argue
16 with you about the 12(b)(6) standard, and I don't want to argue
17 with you any more about what happened in the last three years
18 of the case.

19 I am telling you that my position right now, my view
20 right now -- which I will give you the opportunity to change my
21 mind on -- is that the allegation, "I was denied the
22 opportunity to participate in the filling of the following 45
23 positions," does not state a claim for race discrimination.

24 It needs to specify whether the argument -- whether the
25 factual allegation is that the positions were not posted

1 because United wanted to prevent African American people from
2 getting them, or -- or, "I actually applied for these positions
3 and was denied them because I'm African American."

4 The factual allegations -- the complaint, the complaints,
5 do not state either of those sets of factual allegations. It
6 only says, "I was denied the opportunity to participate in the
7 filling of 45 positions."

8 That doesn't state a claim because I don't know what you
9 mean by that. And so it doesn't satisfy the *Twombly* standard.
10 We have to know what your allegations are in order for you to
11 be allowed to go forward.

12 And so the question, then, is why -- how can I decide the
13 venue question when I don't know what the lawsuit is about?

14 Because you haven't stated clearly what your race
15 discrimination claims are about.

16 How can I decide the venue question first in those
17 instances?

18 **MR. SMITH:** Your Honor, location of the positions is
19 going to be key to the venue analysis.

20 **THE COURT:** Exactly.

21 **MR. SMITH:** Okay. So if I come in --

22 **THE COURT:** That's my point. Yeah. That's my point.

23 **MR. SMITH:** Okay. We gave you the locations of the
24 positions. What you're concerned about is this -- and you
25 expressed concern at the last hearing about using the phrase

1 "challenge a position." What does that mean; right?

2 And the manner in which an employee went about
3 challenging the position --

4 **THE COURT:** And what you told me, and what you told me,
5 is that what you meant by "challenging the position" is that
6 the employee had to put his hat in the ring for the position,
7 and the decision-maker had to pass over the employee because of
8 his race, and the employee would have gotten the job if -- but
9 for the race discrimination.

10 And you said that to me two weeks ago. You said that
11 was -- those were your allegations about what happened. And
12 you said the employee can't win unless the employee can't prove
13 that.

14 But those allegations are not in the complaint.

15 **MR. SMITH:** Your Honor, the employee cannot within if
16 there's not intentional discrimination; right? So I can't
17 discriminate against you if I don't know you want to be
18 considered for the position.

19 **THE COURT:** Right.

20 **MR. SMITH:** Race can't be a factor; right?

21 **THE COURT:** Right.

22 **MR. SMITH:** Right?

23 **THE COURT:** And so the problem is your complaint has
24 not -- so you say, "Well, there are these positions in
25 California." But your complaints don't include allegations

1 that the individual put his hat in the ring for the position
2 and was denied the -- denied the position because of race. The
3 complaint doesn't include those allegations, so how I am I
4 supposed to decide venue until that's cleared up? Before
5 that's cleared up?

6 **MR. SMITH:** And I think what we're -- what I'm concerned
7 about is we're taking the probability standard from the
8 12(b)(6) world and infusing that in the venue.

9 **THE COURT:** Okay. I am telling you right now I cannot
10 tell what the allegations are in the complaint. I cannot tell,
11 from reading the complaint, whether any of the individual
12 plaintiffs were actually denied any positions in California
13 because of race. I cannot tell. Okay?

14 How can I decide venue if I cannot tell whether the
15 complaint alleges that?

16 **MR. SMITH:** Your Honor, I'm not familiar with any
17 authority that says you have to have plausible claims before
18 the Court can consider a venue motion. I'm aware of no
19 authority.

20 **THE COURT:** Okay, so how are we to decide the venue
21 question --

22 **MR. SMITH:** The venue question would be decided in this
23 fashion: Number one, a lot different from 12(b)(6) is you can
24 consider material outside of the pleadings. At the venue stage
25 you can say, "Plaintiffs, I want to know from you, I want to

1 hear from you what this challenge means."

2 I can do that at venue. You can't do that at 12(b)(6) --
3 the 12(b)(6) stage.

4 You have the leeway to do that. You could ask for
5 whatever information outside of the pleadings to shore up any
6 concerns that you have.

7 And after deciding that venue issue, Your Honor, you can
8 then say, "Counsel, your clients are putting information that I
9 think needs to be put into the complaint."

10 And you can do that.

11 **THE COURT:** So --

12 **MR. SMITH:** But to do it reverse -- to do it reverse and
13 say, "Go out and make a plausible claim and then I'll -- then
14 I'll do venue," and you just said your concern is because of my
15 statements in court, again, you can't consider anything else
16 out of the pleading --

17 **THE COURT:** I don't know how many times I have to say
18 this. I'm reading the complaint, the words in the complaint,
19 and they don't state a claim for race discrimination.

20 **MR. SMITH:** I think Your Honor's concerns -- I think a
21 more efficient manner -- and, Your Honor, I truly respect --

22 **THE COURT:** Why is it more efficient -- so you're saying
23 we should go outside the record and we should decide, you know,
24 motions to transfer, before cleaning up the pleadings.

25 And so that would involve, I assume, the depositions of

1 each of the plaintiffs?

2 **MR. SMITH:** I don't think depositions, Your Honor. I
3 think you would help us develop a strategy and ease your
4 concerns.

5 I think what your concerns are is, "Hey, if you don't
6 have a plausible claim in the spirit of Rule 1, why did the
7 defendant's have to go out and respond to a bunch of
8 discovery?"

9 And we want to set up a -- excuse me. We want to set up
10 a mechanism to avoid that from happening because that's not --
11 that may be a concern of yours.

12 And so if there's a concern about plausibility, or, "Hey,
13 I'm not too concerned about the venue; I can't decide the venue
14 issue; I need more information," you have the ability, Your
15 Honor, to say, "Plaintiff, give me this information I'm looking
16 for so that I can make an informed decision about venue."

17 **THE COURT:** So your -- what you're saying -- okay.
18 Sorry.

19 **MR. SMITH:** My concern, Your Honor --

20 **THE COURT:** And so what -- I mean, how can -- so -- and
21 then that could happen without the defendants being allowed to
22 depose the individual plaintiffs?

23 **MR. SMITH:** Just like you helped us, Your Honor. You
24 said, "Hey, listen, Plaintiffs' counsel, I have some questions
25 about venue from the defendant. Submit the interrogatories to

1 me, I will approve them, and then we'll have the defendants
2 respond to them."

3 You can do something very similar, too, if there's any
4 issues, that you want to be answered, by the plaintiffs. They
5 could do so via interrogatory responses or declaration.

6 And if you feel that deposition's the only way, I just
7 feel that -- I think that would be a very expensive process to
8 go through to get this information from the plaintiffs to clear
9 up your concerns on the venues.

10 **THE COURT:** But why not just clean up the complaint and
11 then -- to the extent that questions about venue remain after
12 you've cleaned up the complaint, then more targeted discovery
13 can be taken?

14 **MR. SMITH:** Well, Your Honor -- and this is where we've
15 been butting heads. And we're not going to waive that. You
16 don't have the authority to revisit the order.

17 We're going to brief that issue.

18 **THE COURT:** Sure.

19 **MR. SMITH:** And so that's why we're not going to just
20 agree.

21 **THE COURT:** Sure.

22 **MR. SMITH:** And I'm saying, in the meantime, if we're
23 going to brief --

24 **THE COURT:** But -- but let's say I disagree with you that
25 I don't have the author- -- let's say I disagree with you that

1 a district court does not have authority to reconsider prior
2 orders. Let's say I disagree with you about that proposition
3 and that I determine that the complaints don't state a claim.
4 Okay?

5 MR. SMITH: We're going to ask for it to be certified for
6 interlocutory appeal.

7 THE COURT: And I'll deny that. And then what will --
8 and then let's say I continue to disagree with you.

9 MR. SMITH: Okay.

10 THE COURT: Okay? And I decide that it wouldn't be
11 appropriate to certify for interlocutory appeal the question
12 whether district courts have the authority to reconsider prior
13 orders by the district court. Why would it be more efficient,
14 at that point, to view discovery on venue before cleaning up
15 the complaints, and then -- and giving you one more chance, and
16 then, assuming you actually do state a claim for race
17 discrimination, then we can do, if necessary, more targeted
18 discovery on the venue question?

19 MR. SMITH: I just think because of venue, rules allow
20 the court to cross out of the four pleadings and 12(b) does
21 not. If we're allowed to cross out of the four pleadings -- I
22 mean, the four corners of the pleading -- excuse me, Your
23 Honor -- I think you could become more familiar with the
24 plaintiffs' allegations. And you're allowed to do so.

25 We're not going to have an agreement today from me that

1 we don't state plausible claim.

2 THE COURT: I understand that.

3 But are you not capable of answering the question "Assume
4 for the purposes of discussion that I'm not going to agree with
5 you about that"?

6 MR. SMITH: Okay.

7 THE COURT: Are you not capable of adopting that
8 assumption in this dialogue?

9 MR. SMITH: I am, Your Honor.

10 THE COURT: Okay.

11 MR. SMITH: I apologize.

12 THE COURT: So assume that I'm not going to agree with
13 you on that.

14 MR. SMITH: Okay.

15 THE COURT: Why would it -- I just don't understand why
16 it would be more -- why wouldn't it be more efficient to clean
17 up the complaint first and do targeted discovery on what's
18 actually alleged in the complaint, as opposed to sort of
19 allegations about, you know, being denied the opportunity to
20 participate in the filling of 45 positions all over the
21 country?

22 MR. SMITH: Yeah. One of the things that we focused on,
23 a case that we cited for the Court, is *Turnley v.*
24 *Bank of America*. And it was a similar case involving unposted
25 positions throughout the country.

1 And there the district court said, "A concern that we
2 have at the pleadings stage is the defendant is asking the
3 plaintiff to -- without the benefit of discovery, to state for
4 venue purposes how discrimination occurred."

5 And what we're getting to now is -- this is the big issue
6 we have, is the Court is saying the most efficient way to move
7 forward is first for the plaintiffs to tell me how they got --
8 how United went about locking them out of management positions,
9 how did it come that we have close to 600 years of service and
10 less than five years in management? How is it that every day
11 these individuals go to work and they supervise other pilots?
12 They're supervisors every day they work, yet they're not in
13 management?

14 So we have statistical evidence -- the EEO reports; we
15 have the anecdotal evidence --

16 **THE COURT:** Okay. Okay. I understand your argument.

17 So what we're going to do is tee up, I guess -- I mean, I
18 guess I should give you an opportunity to weigh in on this, but
19 my tentative plan would be to tee up Montgomery and Gadson
20 right away for a transfer -- for transfer motions and issue an
21 order to show cause why the remaining 20 complaints should not
22 be dismissed for failure to state a claim and require them to
23 respond to the order to show cause, give you an opportunity to
24 reply to their response, and then have a hearing on it.

25 And then, then -- and to do it on a fairly accelerated

1 basis, frankly.

2 And then they -- and then assuming I dismiss the
3 complaints, or assuming they decide that they want to amend
4 their complaints to address the concerns that I've expressed
5 about their deficiencies, then we would get back together on a
6 case management conference and decide which cases are
7 appropriate to tee up for venue motions at that time.

8 **MS. MELBY:** Right. Well, the only -- the only difference
9 that we would have with that plan, Your Honor, is that venue
10 depends on having viable claims. It's very difficult for us to
11 write a venue motion without knowing what the allegations are.

12 And so I would only suggest to the Court that those two,
13 Montgomery and Gadson, be placed in the same situation with the
14 other 20 and be handled in the same way.

15 **THE COURT:** But whatever the complaints say or fail to
16 say in Montgomery and Gadson, it's clear -- it sounds like
17 everybody agrees that the only venue hook is Taleo.

18 **MS. MEMBLY:** Well, we don't even agree with that.

19 **THE COURT:** Well, the only potential venue hook is Taleo;
20 right? I mean, I'm very skeptical, very skeptical, that Taleo
21 actually confers venue.

22 **MS. MEMBLY:** Well, rather than go through what could be a
23 futile exercise on Montgomery and Gadson, we can submit a
24 declaration that just says that Taleo is not in Dublin,
25 California, it's not in Redwood Shores, California --

1 **THE COURT:** And then I should just transfer them without
2 you filing a motion to transfer and without them having the
3 opportunity to respond to your motion to transfer?

4 **MS. MEMBLY:** They should have an opportunity to respond,
5 Your Honor.

6 **THE COURT:** Okay. Right.

7 So I think -- I think the best thing to do -- and so what
8 I would like to do is -- and I'd like to tee it all up for a
9 hearing at the same time. So I'd like to tee up, for hearing,
10 on the same day, your motion to transfer the Montgomery and
11 Gadson cases --

12 **MS. MEMBLY:** Mm-hm.

13 **THE COURT:** -- and the order to show cause why the other
14 20 complaints should not be dismissed in whole or in part for
15 failure to state a race discrimination claim.

16 And I say we tee that up, you know, very quickly, on an
17 accelerated basis, like, mid May, or something like that.

18 **MR. SMITH:** The sooner the better, Your Honor, for us.
19 So we're happy with an accelerated schedule.

20 **THE COURT:** I thought you'd left.

21 **MS. SIMS:** Your Honor, I promise I'm not trying to
22 interject in this discussion.

23 I just want to make sure that Defendants had no objection
24 to what we agreed to on the record today as to the transfer
25 of --

1 THE COURT: Transferring --

2 MS. SIMS: -- (indiscernible) and Haynie's, yes.

3 THE COURT: Transferring Haynie?

4 MR. SIMS: Yes.

5 THE COURT: Yeah, that's a good point.

6 MS. SIMS: Any objections?

7 MS. MEMBLY: No objection.

8 THE COURT: Okay.

9 UNIDENTIFIED FEMALE SPEAKER: Thank you, Your Honor.

10 THE COURT: Sure.

11 You could have interrupted a lot sooner, if you'd wanted
12 to.

13 MS. SIMS: May we be excused?

14 THE COURT: You may, yeah.

15 So what about, like, say, like, the third week of May or
16 something?

17 THE CLERK: (Inaudible.)

18 THE COURT: The 21st? Okay, yeah, May 21st.

19 So May 21st we're going to have a hearing on two things.
20 One is going to be defendant's motion to transfer Montgomery
21 and Gadson, and two is going to be a hearing on the order to
22 show cause, which I will write and issue.

23 MR. SMITH: Okay.

24 THE COURT: Order to show cause why the remaining 20
25 cases should not be dismissed in whole or in part for failure

1 to state a claim.

2 MR. SMITH: Your Honor, your order to show cause is going
3 to be limited to the unposted positions? Or are there concerns
4 about the posted positions?

5 THE COURT: I don't have concerns about the allegations
6 relating to the unposted positions. So technic- -- I mean --
7 excuse me, to the posted positions.

8 MR. SMITH: Okay.

9 THE COURT: So technically, I don't know if -- maybe --
10 maybe it actually makes more sense to ask to do an or- -- as to
11 the plaintiffs who allege that they were denied -- that they
12 applied for and were denied posted positions because of their
13 race, maybe it's -- the question is whether the allegations
14 about unposted positions and special assignment positions
15 should be stricken.

16 And I do think that 99 percent of the time it's a waste
17 to strike allegations, but I think these cases are such a mess
18 that it would be appropriate to -- in this case, to strike
19 those allegations.

20 So that's what the order to show cause --

21 MR. SMITH: Okay.

22 THE COURT: -- will be.

23 And like I said, I'll issue that in writing so that the
24 parties have guidance, and I'll put in an alternative mechanism
25 so that if you decide you want to amend the complaints on your

1 own, rather than going through the process of responding to the
2 order to show cause, you can do that.

3 But as I've said a couple of times already, either way
4 you are only going to have one more opportunity to amend your
5 complaints to state a claim for race discrimination.

6 **MR. SMITH:** I understand.

7 And I think what -- Your Honor, we will brief it because
8 I think you'll give us some instruction either way we go.

9 I think we are going to brief it because I think you'll
10 give us some instruction as we go through that process.

11 **THE COURT:** Fair enough.

12 **MR. SMITH:** And it will be helpful for us.

13 **THE COURT:** Yeah, and I want to make sure that you're --
14 you know, your clients are not -- you know, are -- I just --
15 I'll scratch that sentence.

16 But I want to make sure that you and your clients have
17 every opportunity to understand what it would take to state a
18 claim.

19 **MR. SMITH:** Yes.

20 **THE COURT:** And I don't want your clients to be
21 punished --

22 **MR. SMITH:** I understand.

23 **THE COURT:** -- for not having that opportunity.

24 And so if what it takes is going through a round of
25 briefing and oral argument, that's totally fine.

1 **MR. SMITH:** Okay. And I just don't want the Court to
2 take it as a sign of disrespect. I just think it would be
3 helpful for us, as we go through that process.

4 **THE COURT:** I think that's great.

5 **MR. SMITH:** Okay.

6 **THE COURT:** I think that's -- that's fine.

7 **MR. SMITH:** The issue with the accelerated schedule for
8 venue.

9 In the case management conference statement we pointed
10 out that we have not completed the exchange of discovery on the
11 Taleo issue yet.

12 **THE COURT:** Right.

13 **MR. SMITH:** And the concern is, the defendants have a
14 concern about attorneys' eyes only provisions and modifying the
15 Northern District's model for a protective order.

16 We have some concerns about that. I don't know if we
17 should -- if you want to set a deadline to getting that
18 resolved --

19 **THE COURT:** Yeah, I'll give you a deadline of Monday --

20 **MR. SMITH:** Okay.

21 **THE COURT:** -- to either resolve that.

22 So Monday, what's the date?

23 **MR. SMITH:** 14th.

24 **THE COURT:** Monday. April 14th?

25 **MR. SMITH:** 13th? 13th.

1 **THE COURT:** April 13th.

2 So you have a deadline of Monday, April 13th, to resolve
3 any discovery issues regarding Taleo.

4 Did I say "Jaleo" before?

5 **MR. SMITH:** No, you said "Taleo."

6 **THE COURT:** Jaleo is --

7 **MR. SMITH:** Only -- you only said, "I don't have a
8 problem with 'unposted' positions." That was the only mistake.

9 **THE COURT:** That was the only mistake.

10 **MR. SMITH:** The only mistake.

11 **MS. MEMBLY:** Your Honor.

12 **THE COURT:** Jaleo's a nice tapas restaurant in DC -- and
13 Vegas, now.

14 **MS. MEMBLY:** Can I just be heard on this protective order
15 issue for just a moment?

16 **THE COURT:** No. Because you guys -- you guys will need
17 to resolve it, and if you don't resolve it by Monday, you need
18 to file a discovery -- discovery letter.

19 And the losing side of that discovery letter will pay
20 costs to the winning side.

21 **MS. MEMBLY:** Well, we have really met and conferred quite
22 a bit and we're really down to only two issues, and it's not
23 the issue that counsel identified. It's the issue of
24 challenging --

25 **THE COURT:** I've got three other cases, and you-all just

1 need to be able to figure this out.

2 And if you can't figure it out, you can file a discovery
3 letter and the losing side will pay the costs of the winning
4 side.

5 **MS. MEMBLY:** Okay. And then the other thing is on the
6 21st, Your Honor, I'm required to be in court in the morning.
7 Is there -- is there a different -- was that a 10:00 A.M.
8 appearance that you had in mind? A 1:30? What was that?

9 **THE COURT:** It is, but we can specially set it. You say
10 you're going to be in court in the morning?

11 **MS. MEMBLY:** Right. In Los Angeles, but --

12 **THE COURT:** Oh. What is that? What's that case?

13 **MS. MEMBLY:** That's a Thursday.

14 Oh, what case is that?

15 **THE COURT:** Yeah.

16 **MS. MEMBLY:** It's Gonzales versus Del Sol Foods.

17 **THE COURT:** And what do you need to be in court for?

18 **MS. MEMBLY:** It's the first appearance on a class action.

19 **THE COURT:** Case management?

20 **MS. MEMBLY:** Case management. Mm-hm.

21 **THE COURT:** Okay. Yeah, I'm going to schedule this for
22 Thursday. And I think that you, you know, seek a continuance
23 in that, or get --

24 **MS. MEMBLY:** Okay. I will do that.

25 **THE COURT:** Or get one of your partners to appear.

1 **MS. MEMBLY:** I'll do one of the other.

2 **THE COURT:** This has been going on for too long and --

3 **MS. MEMBLY:** Okay.

4 **THE COURT:** So yeah, 10:00 o'clock on Thursday.

5 And I'll set the briefing schedule when I issue the order
6 to show cause.

7 **MR. SMITH:** Thank you, Your Honor.

8 **THE COURT:** Okay. Thank you.

9 (Whereupon, the proceedings were adjourned at 10:56 A.M.)
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CERTIFICATE OF CONTRACT REPORTER/TRANSCRIBER

I, Kelly Polvi, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further, that I am not financially nor otherwise interested in the outcome of the action.

Dated this 12th day of April, 2015.

A handwritten signature in cursive script that reads "Kelly Lee Polvi".

Kelly Polvi, CSR, RMR, FCRR
Contract Reporter/Transcriber